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Supreme Court of the United States

OCTOBER TERM, 1927.

No. [redacted] 3 -1

J. SMYLIE HERKNESS,

Appellant,

vs.

VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1927

J. SMYLIE HERKNESS, Appellant, vs. VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.	No. 50

BRIEF FOR APPELLANT.

Reference to Opinion Below.

The opinion of the Court below by District Judge Burns (R., 31), is reported at 11 Federal (2d) 386.

The decree of the Court below was entered March 6, 1926 (R., 37-38).

Grounds of This Court's Jurisdiction.

The jurisdiction of the Federal Court was invoked by the complainant on the ground that the dispute arose under the Fourteenth Amendment, and on the ground of diversity of citizenship (R., 11). Complainant asked an interlocutory injunction against state officers, the Louisiana Commissioner of Conservation and the Attorney General. The District Court, finding that the case arose under Section 266 of the Judicial Code, ordered that the application for an injunc-

tion be heard before three judges (R., 16). Upon the hearing before this special tribunal, it was agreed that the Court might go on to final decree on the bill, answer and affidavit of complainant. The special tribunal, having thereupon dismissed the bill, granted an appeal to this Court (R., 45).

The jurisdiction of this Court is invoked under paragraph (3) of Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, §1, 43 Stat. 936, 938).

It is believed that the jurisdiction of this Court is sustained by:

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390;
Oklahoma Gas Co. v. *Russell*, 261 U. S. 296, 293;
Louisville & Nashville Ry. Co. v. *Garrett*, 231 U. S. 298;
Ohio Tax Cases, 232 U. S. 576, 586;
Green v. *Louisville & Interurban Ry. Co.*, 244 U. S. 499, 508;
Lincoln Gas Co. v. *Lincoln*, 250 U. S. 256, 264;
Chicago Great Western Ry. Co. v. *Kendall*, 266 U. S. 94, 97;
Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317;
Smith v. *Wilson*, 71 L. Ed. 415.

Statement of the Case.

The complainant, Herkness, a citizen of Pennsylvania, is the owner in fee simple of 80 acres of land and of the natural gas rights under 760 contiguous acres, all in the Monroe Gas Field of Louisiana (R., 1-2). On this acreage, two producing gas wells, one on the fee simple tract, the other on the contiguous area, were drilled under state permit. Plaintiff bought the land and gas rights with these wells for $212,000 cash, with a view to manufacturing the gas into carbon black (R., 3). The property has no substantial value, unless used

for that purpose. The carbon black, when produced, was to be sold to the Johnson Company, a manufacturer of printing ink (R., 9).

The Laws of Louisiana and the Regulations of the Department of Conservation were asserted to require a manufacturer of carbon black to get a permit in advance from the Department. The complainant therefore applied to the defendant Irion, who is the Commissioner of Conservation, for a permit to erect a carbon black plant at his wells (R., 13). The application was proper in form under the statute; and the applicant was and is ready and willing to comply with all the statutory requirements relative to the manufacture of natural gas into carbon black (R., 24).

Dr. Irion, however, believes that the manufacture of natural gas into carbon black is wasteful, and that the gas could be used more efficiently and economically for industrial and domestic purposes (R., 20-21). Accordingly, in 1924, he inaugurated and publicly announced a policy of issuing no new permits for carbon black plants, and of gradually reducing the amount of natural gas which holders of old permits could utilize for that purpose (R., 22-23). Within a reasonable time, as his answer avers, he hopes completely to suppress the manufacture of carbon black in Louisiana (R., 23).

Pursuant to this policy Dr. Irion decided to refuse the complainant's application for a permit. He referred to the defendant Saint, the Attorney General of the State, the question of his legal authority to refuse the permit. The Attorney General advised him that he had full power to decline any further permits (R., 15). Dr. Irion therefore sent to complainant's attorney a copy of this opinion, "upon the strength of which your application is hereby respectfully denied" (R., 14).

Both the Attorney General and the Commissioner of Conservation informed complainant that they would use all legal means at their command to prevent his manufacture of carbon black without a permit (R., 18). By Statute (Section 8 of

Act 252 of 1924) one who violates an order of the Commissioner of Conservation promulgated by authority of that Act, which orders "are hereby declared to have the force and effect of statutory law", is guilty of a misdemeanor, and is subject to fines of from $100 to $10,000. Each day on which the violation occurs is a separate offense (R., 6), and three convictions within a period of two years are ground for ouster from the State.

Complainant thereupon applied to the District Court of the United States for an injunction restraining the defendant from interfering with the erection of a carbon black plant on complainant's land, or with the operation thereof, and restraining them from attempting to impose penalties for the erection or operation of the plant (R., 11).

The bill sets up the facts hereinabove summarized (R., 15) and also other facts concerning the production and use of carbon black. These facts may well be supplemented by others reported by the United States Bureau of Mines.

Carbon black is the product resulting from the incomplete combustion of gas deposited by contact of a flame upon a metallic surface.* 180,000,000 pounds were produced in the United States in 1926, of which 72 per cent. was produced in Louisiana. About half of this product was used in the rubber industry, about one-quarter was exported, and about one-eighth was used in the manufacture of ink.† The bill (filed in December, 1925) avers, and the answer does not deny, and complainant's affidavit also avers that a combination of carbon black manufacturers then in the Monroe field had recently been effected; that there was an agreement between these manufacturers and Dr. Irion that the total amount of gas used in the production of carbon black should not exceed an amount fixed in the agreement; that the distribution of that

(*) Department of the Interior, Bureau of Mines, Bulletin 192, page 1.

(†) "Carbon Black produced from natural gas in 1926". Mineral Resources of the United States, 1926—Part II-3, pages 13-16. Bureau of Mines.

amount was left to the manufacturers; and that no new permits were to be issued by Dr. Irion to persons who were not parties to the agreement (R., 9-10, 25). The Department of Mines reports that there were fewer producers in Louisiana in 1926 than in 1925, although the number of plants did not change.†

Inasmuch as carbon black is an essential ingredient of news ink, the Johnson Company, a long-established manufacturer of ink, must buy it, and Louisiana dominates the market. It will buy and use Louisiana carbon black in any event, but if complainant were not permitted to manufacture, it would have to buy from the combination at an enhanced price (R., 9). The bill avers that since the combination became effective, the price of carbon black has greatly increased (R., 9). The Bureau of Mines, in its report, remarks that "the decrease in average value in 1925 in the face of greatly increased demand and the increase in average value in 1926 in the face of decreased demand were interesting."†

The defendants, answering the bill, admitted the refusal to grant complainant a permit; averred that no permits had been granted to anyone for new plants since 1924, and claimed the right to discriminate between owners of existing plants and persons who desired to build new ones (R., 18-23). On this bill and answer and an affidavit of complainant given in lieu of testimony (R., 24-25) the case was heard. The parties agreed that the Court might go on to final decree (R., 30). The Court, consisting of Foster, Circuit Judge, and Grubb and Burns, District Judges, dismissed the bill (R., 37-38). Subsequently an appeal was allowed to this Court, and pending the determination of the appeal by this Court, the defendants were enjoined from interfering with the erection or operation of a carbon black plant on complainant's land, and from attempting to impose penalties on him for such operation (R., 45).

Specification of Assigned Errors Intended to Be Urged.

Appellant will rely on all of the assignments of error (R., 41-44). They involve eight points as follows:

1. The Court below had jurisdiction and an appeal was properly allowed to this Court.

2. The order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.

3. The Statutes of Louisiana and particularly Act 252 of 1924 do not authorize the Conservation Commissioner to refuse permits for the manufacture of natural gas into carbon black by persons not theretofore engaged in such industry.

4. If the laws of Louisiana are construed as delegating to the Conservation Commissioner the right to refuse to grant permits for the manufacture of carbon black to those not theretofore engaged in such industry, then such laws are in violation of the Constitution of Louisiana and the Constitution of the United States.

5. The order of the Conservation Commissioner is contrary to the Fourteenth Amendment of the Constitution of the United States.

6. An injunction to restrain the Conservation Commissioner and Attorney General of Louisiana from interfering with the use of complainant's property in the manufacture of natural gas into carbon black is the proper remedy to be pursued.

7. The right to proceed by mandamus in the State Court, if it exists, is not such an adequate remedy at law as to deprive complainant of his right to equitable relief in the Federal Court.

8. This is not a suit against the State of Louisiana within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States.

Summary of Argument.

The Conservation Statutes of Louisiana contemplate that the production of carbon black from natural gas shall be regulated, limited and controlled, but not prohibited. They do not authorize, either expressly or by implication, the Conservation Commissioner to prohibit at his discretion. If they did, there would be a delegation of legislative power contrary to the Louisiana constitution.

The order of the Conservation Commissioner which is complained of permitted owners of gas wells who had already built plants to engage in the manufacture of carbon black, but prohibited that manufacture to complainant, whose situation was the same as that of the other owners of gas wells except that he had not yet built a plant. Such an order cannot be sustained as a measure which conserves natural resources, because it does not conserve gas. It merely conserves the material and machinery which the newcomer desires to invest in his venture. Without limiting the aggregate quantity of gas consumed, it grants a monopoly to the owners of plants already built. Such a discrimination between those who have engaged in the business and those who desire to do so violates the Fourteenth Amendment.

Complainant, a citizen of Pennsylvania, who owns gas wells in Louisiana, is irreparably damaged by the discriminatory policy which the Conservation Commissioner is threatening to enforce against him. He has the right to invoke the protection of the Federal Courts. That power having been invoked, the Federal Court is bound to protect his rights by appropriate remedies. Not having the power to mandamus the State Commissioner to grant a permit for the erection of a plant or to grant any other adequate remedy at law, it should enjoin the Commissioner from interfering with the erection of the plant by the complainant without a permit or from imposing penalties on him for violating the Commissioner's order. A suit to restrain a State officer from

enforcing against complainant an illegal or unconstitutional order is not a suit against the State of Louisiana as contemplated by the Eleventh Amendment; it is a suit against the individuals. As the action to be enjoined threatens complainant's property rights, it does not come within Section 265 of the Judicial Code. The defendants should therefore be enjoined from interfering with complainant in the operation of his carbon black plant so long as he complies with the statutory requirements relative to its operation, or from invoking criminal penalties against him for operating it.

ARGUMENT.

I.

The Court Below Had Jurisdiction and an Appeal was Properly Allowed to this Court.

The Court's jurisdiction in this case appears so clear as to merit only a cursory discussion. There is diversity of citizenship and there is a question under the Fourteenth Amendment. The order of the Conservation Commissioner complained of, as the complainant contends, violates rights guaranteed to him by the Fourteenth Amendment. If the Louisiana Statute authorized the order complained of (as defendants assert and complainant denies), then the Statute is unconstitutional. Whether or not the unconstitutionality of the statute be pleaded, the contention that the order is unconstitutional gives the Court jurisdiction. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 293. Recognizing the authority of the cited case, the Court below took jurisdiction (R., 34). See *Chicago, etc. Ry.* v. *Kendall*, 266 U. S. 94, 97. *Greene* v. *Louisville, etc. R. R. Co.*, 244 U. S. 499, 507. *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 390.

II

The Case Comes Properly Under Section 266 of Judicial Code.

Finding that the case arose under Section 266 of the Judicial Code as amended, the District Court ordered that the application be heard before the special tribunal of three judges designated by that statute. The case was heard on bill and answer and an affidavit of the complainant in lieu of testimony. Inasmuch as the relief sought was an interlocutory injunction restraining the enforcement of an order of an administrative board, which purported to be made pursuant to the statutes of Louisiana, it is clear that Section 266 is applicable. The Court below therefore properly allowed an appeal directly to this Court (R., 44-46). The special statutory court was assembled and the hearing before it was had upon the application for a preliminary injunction; it was stipulated thereupon that the court might proceed without further stay to final decree (R., 30). This differentiates the case from *Smith* v. *Wilson*, 273 U. S. 388; 47 S. C. 385, and the hearing was before three judges, which differentiates it from *Moore* v. *Fidelity & Deposit Company*, 272 U. S. 317, and from *Ex parte Buder*, 271 U. S. 461.

III.

The order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.

The Court below derived its jurisdiction over the controversy from the Federal question involved. Having taken jurisdiction, it owed the duty (to use its own language) to try the question whether a preliminary injunction should

issue (R., 34). But in performing that duty it assumed that it was "concerned only with violations of the Federal Constitution" (R., 34). It therefore did not discuss and presumably did not consider, the illegality of the order under the state statutes and constitution.

This we submit was clear error. Regardless of the source of its jurisdiction, the Court should have determined all of the questions involved, whether arising under State Statutes or the Federal Constitution. *Louisville & Nashville Railway Co.* v. *Garrett*, 231 U. S. 298; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 264; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 97; *Green* v. *Louisville & Interurban Ry. Co.*, 244 U. S. 499, 508; *Ohio Tax Cases*, 232 U. S. 576, 586; *Risty* v. *Chicago, etc., Ry.*, 270 U. S. 378, 387. Here, as in the case last mentioned, the constitutional questions raised are "questions of substance and sufficient to give the Court jurisdiction to pass on the whole case." If we are correct in our views however this case may well turn, as that case did, on the construction and application of the State law, and without requiring the determination of the federal question. In that case the legality, under the State Statute, of the orders complained of, had at least been before the State Court in other proceedings, although not definitely decided there. In this case the order of the Commissioner of Conservation has never been considered by a State Court. This case therefore affords an application even clearer than the *Risty* case itself of the rule therein stated, viz., that "It is the duty of the Federal Courts, in suits brought in or removed to the District Courts, to decide for themselves all relevant questions of State law." *Risty* v. *Chicago, etc., Ry., supra*, page 387.

Accordingly we turn to the constitution and laws of Louisiana to learn whether the action complained of is warranted by law. It is submitted that it is not.

A. THE STATUTES OF LOUISIANA DO NOT PROHIBIT THE MANUFACTURE OF NATURAL GAS INTO CARBON BLACK, NOR DO SUCH STATUTES VEST THE COMMISSIONER OF CONSERVATION WITH POWER TO RESTRICT SUCH MANUFACTURE TO PERSONS ALREADY ENGAGED THEREIN, AND TO REFUSE TO PERMIT NEW CONCERNS TO ENGAGE IN SUCH MANUFACTURE. ON THE CONTRARY, THE LOUISIANA STATUTES EXPRESSLY ACCORD THE RIGHT TO ALL TO ENGAGE IN SUCH MANUFACTURE, PROVIDED THEY COMPLY WITH THE CONDITIONS IMPOSED BY SAID STATUTES.

Section 1 of Article VI. of the Constitution of Louisiana of 1921, provides:

> "The natural resources of the State shall be protected, conserved and replenished, and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, *who shall have and exercise such authority and powers as may be prescribed by law.* The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State and to prohibit and prevent the waste or any wasteful use thereof."

Pursuant to this Constitutional authority, the Legislature of Louisiana has passed two statutes concerning the use of natural gas in the manufacture of carbon black, viz: Act 91 of 1922 and Act 252 of 1924 the relevant portions of which are printed in an Appendix to this brief. Section 10 of the Act of 1924 provides that "this Act shall be cumulative of and in addition to the laws of this State, which are not in direct conflict with the provisions hereof." Section 11 of said Act provides that "the authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other Act

of this State, but shall be cumulative and in aid thereof." The Act of 1924 contains no repealing clause.

The Supreme Court of Louisiana, in the recent case of *State* vs. *Thrift Oil & Gas Co.*, 162 La., 165, 110 So. 188, held that the effect of these provisions was to incorporate the Act of 1922 into the Act of 1924 and make the former Act in substance a Section of the latter Act. The Court said (p. 193):

> "The Act of 1924 was intended to be, and is, the paramount statute regulating the production of natural gas in this state. 'This act shall be cumulative of and in addition to all the laws of this state which are not in direct conflict with the provisions hereof.' Section 10. Hence all laws on the same subject-matter, and not in conflict with this act, are by this clause incorporated into this statute and made part thereof as fully as if set forth, in full therein. So that Act 91 of 1922 is, as it were, a mere section of the act of 1924."

Section 1 of Act 91 of 1922 provides:

> "That natural gas may be used in the manufacture of carbon black under the conditions as fixed and imposed by the provisions of this Act."

Here is a clear and unequivocal legislative declaration legalizing the use of natural gas in the manufacture of carbon black by any and all persons. The sole condition attached thereto is that the other provisions of the Act must not be violated.

We turn now to the other provisions of the Act of 1922 and to the provisions of the Act of 1924 to ascertain whether this strong declaration of legislative policy has been so devitalized and nullified as to clothe the Commissioner of Conservation with the dictatorial power to prohibit such persons as he may see fit from engaging in this legal industry.

Section 2 of Act 91 of 1922 provides:

> "That the Commissioner of Conservation is authorized, directed and empowered to fix and determine on

the 1st day of October, 1922, and semi-annually thereafter, what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black, said percentage of consumption to be based upon the potential capacity of such gas well, and which percentage shall not be less than fifteen per cent and not more than twenty per cent of the potential capacity of such well, provided that in fixing such basis of consumption the same rule, as far as possible, shall be applied to all gas wells in any producing gas area, and provided further, that the percentage of consumption may be increased in any particular well when the safety of such well may demand such increase."

Section 3 of said Act reads as follows:

"That the Commissioner of Conservation is authorized, empowered, directed and required to reduce the consumption of natural gas used in the manufacture of carbon black below the minimum fixed in Section 2 of this Act, after promulgation for sixty days of an order to that effect, whenever it is actually necessary to do so in obtaining an adequate supply of natural gas for domestic heating and lighting purposes in the State of Louisiana, and for manufacturing plants, industries and enterprises located and operated within the State of Louisiana, provided that the conditions set out in this Section shall not become effective until such time as the establishment of factories, industrial plants and enterprises, the construction of pipe-lines in the State of Louisiana, and domestic consumers in Louisiana, or any one of such shall provide a demand which necessitates the enforcement of the same."

Section 4 prohibits the use of natural gas for the manufacture of carbon black without extracting and saving therefrom the gasoline contained therein.

Section 5 authorizes the Commissioner of Conservation "to make, adopt and promulgate rules and regulations which, in his judgment may be necessary for the proper carrying out of the provisions of this Act."

Section 6 makes it the duty of the Commissioner to enforce the provisions of the Act and the rules and regulations adopted by him; and Section 7 makes it the duty of the Department of Justice to represent said Commissioner in the enforcement of said Act, and of the rules and regulations adopted by said Commission.

Section 8 makes it a misdemeanor to violate the provisions of the Act or the orders of the Commissioner, and provides that each day of violation shall constitute a separate offense and subject the offender to a separate penalty, and that three convictions shall subject the offender to a forfeiture of the right to manufacture natural gas into carbon black.

It thus appears that there is nothing whatever in the later sections of the Act of 1922 to nullify the provisions of the first section that "natural gas may be used in the manufacture of carbon black." Certainly nothing to that effect can be found in the second section, which expressly prohibits the Commissioner of Conservation from fixing any lower percentage than fifteen per cent of the potential capacity of each gas well as the percentage that may be used in the manufacture of carbon black. On the contrary, this section expressly recognizes the right to use at least fifteen per cent of such potential capacity in such manufacture. Section 3 cannot be invoked, as it is not claimed that the emergency contemplated therein has arisen or that the Commissioner of Conservation has promulgated the order required thereby as a condition precedent to said section becoming effective. Nor can it be said that the authority granted to the Commissioner of Conservation by Section 4, to make rules and regulations "necessary for the proper carrying out of the provisions of this Act," vests this officer with the power to nullify Sections 1 and 2 of the Act and to absolutely prohibit the use of natural gas in the manufacture of carbon black.

Let us now examine the provisions of the Act of 1924 and ascertain whether they have wiped out Sections 1 and 2 of the Act of 1922.

One of the numerous objects expressed in the title of Act 252 of 1924 is "to define the conditions under which natural gas can be burned into carbon black." Surely the title of this Act does not evince any intent to prohibit the use of natural gas in the manufacture of carbon black, but instead clearly indicates that such manufacture is to be permitted under certain well-defined conditions.

Section 1 of the Act prohibits the production of natural gas "in such manner and under such conditions as to constitute waste"; but in defining the term "waste," it in no way relates it to the manufacture of carbon black.

Section 2 provides minute rules for "drilling for, producing, taking, transporting, piping and using gas in this State."

Section 3 provides "the percentage of the open flow capacity that gas wells may be allowed to produce or that may be drawn from each gas well." This percentage varies according to the acreage of the tract on which the well is drilled. There is, however, a proviso that "where the percentages hereinabove provided applied to any well reduces the amount allowed below one million cubic feet, there may be taken from such well a total of one million cubic feet, provided the back pressure as elsewhere herein provided for shall be maintained." This Section further provides "that the percentage of the open flow capacity of each well as fixed in this Section, depending on location, shall not apply to any well or wells heretofore drilled or to a well or wells the drilling of which was commenced on or before June 24, 1924." The Supreme Court of Louisiana has ruled that the effect of the last two provisos is that a well drilled prior to June 24, 1924, "may still take at least the same percentage of gas as it might have taken under the Act of 1922" (i. e., not less than fifteen nor more than twenty per cent.), but can in any event take at least one million cubic feet of gas if the back pressure is maintained. (*State* v. *Thrift Oil & Gas Co.*, 162 La., 165, 194; *State* v. *Carson Carbon Co.*, 162 La., 781, 791, 111 So. 162.)

Section 4 provides that "the Commissioner of Conservation shall determine in accordance with the above rules the allowable percentage that each gas well may produce."

Section 5 of said Act provides:

> "The Commissioner of Conservation may grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act 91 of 1922, except that the percentage of the open flow of gas wells that may be utilized in burning carbon black shall be controlled by this Act, when the production of such well is controlled by this Act and by Act 91 of 1922, when the percentage that such wells may produce is controlled by said Act 91 of 1922. Such permits shall only be granted to bona fide applicants and which permits shall automatically expire one year after date of issue."

It is further provided in said Section that

> "no permit shall be granted, and the Commissioner of Conservation is without authority to grant a permit for the construction of a new carbon black plant, except upon written application on forms prepared by the Department of Conservation in which application the applicant shall state that he, they or it, will fully and completely abide by and comply with all of the provisions of this Act and with all the rules and regulations of the Commissioner of Conservation established under the provisions of this Act."

It is undisputed that the application tendered by the complainant complied in all respects with the requirements of this section.

Section 6 makes it the duty of the Commissioner of Conservation "to make and enforce rules and regulations for the conservation of the gas of this State, not in conflict herewith."

Section 7 authorizes the Commissioner of Conservation to hire expert help to enforce the provisions of the Act.

Section 8 makes the violation of the rules of the Commissioner of Conservation promulgated under the authority of

the Act a misdemeanor punishable by fine of not less than one hundred dollars nor more than ten thousand dollars, and provides that each day of violation shall constitute a separate offense, and that three convictions for willful violations of the Act, where the second violation succeeds a first conviction and the third violation succeeds a second conviction shall subject the offender to the forfeiture of his right to do business in the State.

Section 9 makes it the duty of the Attorney General and District Attorneys to enforce the Act and fixes the venue of criminal prosecutions thereunder.

Section 10 provides that "this act shall be cumulative of and in addition to all the laws of this State, which are not in direct conflict with the provisions hereof."

Section 11 provides:

> "The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other act of this State, but shall be cumulative and in aid thereof."

Section 12 provides the remedy against corporations violating the provisions of the Act.

Section 13 defines certain words and phrases as used in the Act.

Surely, none of the provisions of the Act of 1924 have nullified the declaration of the Act of 1922 that "natural gas may be used in the manufacture of carbon black." It was certainly never intended by this Act to permit the Commissioner of Conservation to confine this important industry to persons already engaged therein, and to bar all new-comers. Indeed, Section 5 of the Act itself contemplates that the Commissioner should grant permits "for the construction of a new carbon black plant;" and the only condition attached to the granting of such a permit is that "the applicant shall state that he, they, or it, will fully and completely abide by and comply with all of the provisions of this Act

and with all the rules and regulations of the Commissioner of Conservation established under the provisions of this Act." Nor was it ever contemplated that the Commissioner should have the right to grant or refuse permits according to his whim or caprice, and even if the statutes could conceivably be construed as vesting him with any discretion in the issuance of permits, by the express terms of Act 134 of 1924 (Appendix, p. 50) he is forbidden to exercise such discretion except upon the approval of the Attorney-General and the Governor. The defendant Commissioner did consult the Attorney-General but it is nowhere pretended that the Governor of Louisiana has approved the course the Commissioner is pursuing. But as has already been shown it is inconceivable that any discretion in the issuance of permits was given the Commissioner by the statutes. On the contrary, Section 11, out of an abundance of caution, expressly restricts the authority of this officer by providing that:

> "The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other act of this State, but shall be cumulative and in aid thereof."

In his opinion to Commissioner Irion, Attorney General Saint refers to the provisions of Act 250 of 1920, which is also printed in our Appendix. We fail to see what bearing that Act has. It was undoubtedly repealed by implication by the passage of the Acts of 1922 and 1924, as the entire subject matter of the Act of 1920 is covered by these later Acts. Moreover, the Act of 1920 does not purport to prohibit the manufacture of natural gas into carbon black, either by those then engaged therein or by those that may thereafter engage therein, nor does it even require that the persons engaging in such industry must obtain permits from the Commissioner of Conservation. The Act merely vests the Department of Conservation with "supervision over the production and use of natural gas in connection with

the manufacture of carbon black," and vests the Commissioner of Conservation with power to adopt "all necessary and reasonable rules and regulations providing for the conservation of natural gas produced for and used in plants manufacturing carbon black." (Section 3.) The Act clearly recognizes the production of natural gas and its manufacture into carbon black as legal, and does not attempt to confer upon the Commissioner of Conservation any power to prohibit the same, but merely confers upon him the right to make reasonable rules and regulations covering such production and manufacture.

We submit that it is clear that the laws of Louisiana not only do not prohibit the manufacture of natural gas into carbon black, but expressly recognize and contemplate such manufacture. It would certainly require the clearest language to evince a legislative intent to make unlawful a business theretofore undoubtedly lawful, engaged in by a large number of persons, and in no sense obnoxious to the public morals, health or welfare, or, while permitting its pursuit to an existing class, to bar from it all others who might thereafter desire to engage therein.

The statutes grant no implied power, express or implied, to the Commissioner to suppress the manufacture of carbon black altogether. Still less can they be construed as vesting him with discretionary power to prohibit the manufacture to some while permitting it to others. That such a power cannot be left to the arbitrary will of an administrative officer has been repeatedly held by the Supreme Court of Louisiana. *State of Louisiana* v. *Mahner*, 43 La. Ann. 496; 9 So. 480. *State ex rel. Galle* v. *New Orleans*, 113 La. 371; 36 So. 999. *New Orleans* v. *Palmisano*, 146 La. 518; 83 So. 789, *State ex rel. Dickson* v. *Harrison*, 161 La. 218; 108 So. 421.

In the case of *State of Louisiana* vs. *Mahner*, 43 La. Ann. 496, 9 So. 480, the court held that an ordinance prohibiting dairies within certain designated limits is not general in

its operations among the class it is intended to effect, and is therefore void. The court said:

> "The ordinance is not general in its operation. It does not affect all citizens alike who follow the same occupation which it attempts to regulate. It is only those persons who keep more than two cows within the prohibited limits without the permission of the City Council who are subject to the penalties in the ordinance. The discretion vested by the ordinance in the City Council is in no way regulated or controlled. There are no conditions prescribed upon which the permit may be granted. It is within the power of the City Council to grant the privilege to some, to deny it to others.
>
> "The discretion vested in the Council is purely arbitrary. It may be exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality, and oppression prevented. Yick Wo vs. Hopkins, 118 U. S. 356 (6 Sup. Ct. 1064, 30 L. Ed. 220; Horr & Bemis M. P. Ordinances, paragraphs 136, 136)."

In the case of *State ex rel Galle* vs. *City of New Orleans*, 113 La., 371, 36 So. 999, the court granted a mandamus against the city of New Orleans, commanding it to grant to the relator the right to carry on and operate a barroom. The court said (p. 382):

> "The case at bar differs from some of those which have been cited, in that they concerned harmless callings, whilst that in which the relator proposes to engage is usually regarded as pernicious. That fact, no doubt, furnishes a sufficient reason for discriminating against the calling, but it affords no justification for discriminating between persons similarly situated who may be or may desire to become engaged in that calling. The relator occupies the same relation to any other barkeeper that the trade of the barber does to that of the baker, and the principle applied as between the two trades is equally applicable as between the two individuals engaged in the same business or trade. A statute of this State

imposing conditions upon the business of selling intoxicating liquors, although such conditions be more onerous than those imposed upon another business, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the public than another business, but where, as in this case, the state legalizes the business of selling liquors, and an individual citizen is denied the right to engage in it in a place and under conditions where and under which others having no better qualifications than he are so engaged, the law, if any there be, authorizing such denial, has no just foundation in reason or in the police power of the state, for it deprives one citizen of the right to earn his livelihood by means of a lawful calling, whilst according that right to others similarly situated, and, in so doing, deprives him of the equal protection of the law, and of his liberty, without due process of law, and oversteps those restrictions upon legislation which are said to be inherent in the nature of American institutions."

In the case of *City of New Orleans* vs. *Palmisano*, 146 La. 518, 83 So. 789, the court held invalid an ordinance of the City of New Orleans, requiring a permit for the operation of portable gas tanks on the streets of the city, without prescribing any terms or conditions on compliance with which a permit would be granted or without which it should be withheld. The court said (pp. 521-22):

"The objection to the ordinance in question, however, is not that the police power of the municipality does not extend to the regulation of the sale of gasoline, or to the control and regulation of the use of the public thoroughfares for a private business. The objection is that the ordinance does not recognize the constitutional right of every citizen to the equal protection of the laws; that is, the ordinance does not guarantee or recognize that every citizen is entitled to stand before the law on equal terms with any and all others in a like situation, bearing the same burdens that are imposed upon all others in the same situation.

"The objectionable feature, which in our opinion makes the ordinance void, is that it does not prescribe any terms or conditions upon compliance with which a permit shall be withheld. Whether the ordinance was or was not intended to confer, it does in fact confer, upon the commission council, the arbitrary power to grant the permission to one and withhold it from another citizen in a like situation, to conduct what the ordinance concedes to be a legitimate business. It does not restrict the commission council to a legal discretion to be exercised upon consideration of the circumstances of each case. In fact, the ordinance recognizes that the business was being conducted on the sidewalks or thoroughfares of the city when the ordinance was enacted; and, whatever the purpose was, the effect was to give the commission council arbitrary power to leave any person, firm, or corporation in the business, and to the advantage of the favored persons or firms or corporations, to put others, in a like situation, out of the business. An ordinance that purports to confer upon any officer or tribunal the arbitrary control over all citizens in the exercise of a legitimate occupation or business, and to deprive all citizens in a like situation of the right to equal protection in such occupation or business, is not a law, but an attempt to make the arbiter in such case a law in himself."

In the recent case of *State ex rel. Dickson* v. *Harrison*, 161 La., 218, 108 So. 421, the court held discriminatory and unconstitutional an ordinance prohibiting the erection of business buildings within residential zones, save in those instances where special permission was granted by the City Council, on the ground that the ordinance prescribed no uniform rule of action applicable to all similarly situated, but left the matter to the whim and fancy of the city council. The court said (p. 221):

"Plaintiff contends that the reservation as to the granting of permits in each separate instance, by special ordinance, on application made, makes the ordinance discriminatory and unconstitutional. In State v. Carter, 159 La. 121, 105 So. 247, we said:

"'A statute or an ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right by granting or withholding a license or permit or approval, arbitrarily, or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment (referring to the Constitution of the United States). Yick Wo v. Hopkins, Sheriff, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; State v. Mahner, 43 La. Ann. 496, 9 So. 480; State v. Dubarry, 44 La. Ann. 1119, 11 So. 718; State v. Kuntz, 47 La. Ann. 107, 16 So. 651; City of New Orleans v. Palmisano, 146 La. 518, 83 So. 244, 12 A. L. R. 1436.'"

"In the case at bar the council does not seek to confer upon another the power to grant or withhold permits, but, instead, reserves that power to itself, or, in other words, the council, by the ordinance, seeks, as it were, to confer power upon itself to grant or withhold permits. But that difference between the case at bar and the Carter case, from which the foregoing excerpt is taken, is immaterial. See State v. Mahner, 43 La. Ann. 496, 9 So. 480, and Hagerstown v. Baltimore & Ohio R. Co., 107 Md. 178, 68 A. 490, 126 Am. St. Rep. 382. What makes the ordinance objectionable is that it prescribes no uniform rule of action, applicable to all similarly situated, under which the council is to act in granting or withholding permits, but leaves it to the whim and fancy of the council to grant or withhold them. In our opinion the ordinance, because of this objectionable feature, which we think affects it in its entirety, is unconstitutional. We cannot separate the objectionable feature from the rest of the ordinance without making it a materially different enactment, and hence the entire ordinance must fall."

The defendant Irion will contend, perhaps, that his discrimination between persons whom he permits to manufacture carbon black and those to whom he attempts to prohibit the manufacture is not arbitrary, but is based on rea-

sonable principles of classification, viz., that those who have already embarked in the business will be permitted to continue while those who have not yet begun will be prevented from starting. No such principle of classification is laid down in the statute, and as will be pointed out later, it is not a reasonable classification anyhow. It is, moreover, definitely disapproved on authority in Louisiana. *Town of Crowley* v. *West*, 52 La. Ann. 526; 27 So. 53. *Town of Mandeville* v. *Band*, 111 La. 806; 35 So. 915.

The case of *Town of Crowley* vs. *West*, 52 La. Ann. 526, 27 So. 53, involved the validity of a city ordinance making unlawful the establishment or operation of livery stables within the corporate limits, and providing that said ordinance should not apply to livery stables already in existence. The court said (p. 533):

> "We have, then, a case in which it appears that a person engaged in a business which is conceded to be lawful, in which four other persons or firms are engaged, in the same town, and which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a municipal ordinance, arrested and fined because he has failed to establish his said business in a part of the town remote from the business center, rather than at the place which he considers most advantageous; that it further appears that the other four persons or firms engaged in the same business are not, to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly in perpetuity of the livery stable business in Crowley, cannot be seriously entertained. State vs. Mahner, 43 La. Ann. 496, 9 South. 480; State vs. Dulaney, 43 La. Ann. 500, 9 South. 481; State vs. Garibaldi, 44 La. Ann. 814; 11 South. 36; State vs. Sarradat, 46 La. Ann. 703, 15 South. 87, 24 L. R. A. 584; State vs. Kuntz, 47 La. Ann. 107, 16 South. 652; Tugman vs. City of Chicago, 78 Ill. 409; Dill. Mun. Corp. (4th Ed., par. 322)."

In the case of *Town of Mandeville* vs. *Band*, 111 La. 806, 35 So. 915, the court held invalid the ordinance of the town which permitted the continuance of liquor saloons therein, but provided that no new saloons should be opened, unless a petition was filed with the commission council, and no opposition was made thereto within a certain time. The court said:

> "In the second place, we feel quite confident in the correctness of the conclusion that an ordinance should not discriminate in favor of anyone. Drawn as it is in this case, the ordinance would have the effect of permitting the fortunate few who are conducting the saloon business within the designated limits to continue unmolested with their business, while the less fortunate, who come after, are excluded."
>
> "It is well settled in matter of municipal regulation that a person engaged in a particular business in a particular locality is not to be advantaged by an ordinance to permit him to continue his business, whilst others are forbidden from carrying on the same business."
>
> "Principle very similar was laid down in Town of Crowley vs. West, 52 La. Ann. 527, 27 South. 53, 47 L. R. A. 652, 78 Rm. St. Rep. 355, following the leading case of Yick Wo vs. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.
>
> "The ordinance in this case does not apply to all alike, and it does discriminate as to time. It provides, in effect, that from the year 1902, no saloon shall be kept within certain limits, while it leaves free to carry on the business those who were within time limits. The ordinance, in effect, provides that hereafter it shall be unlawful to 'establish or set up a drinking house.'"

B. If Act 91 of 1922 and Act 252 of 1924 Be Construed as Delegating to the Commissioner of Conservation the Right to Refuse Permits at Will or to Confine the Manufacture of Carbon Black to Those Then Engaged in That Industry, Then Said Acts Violate the Provisions of Article II of the Constitution of Louisiana of 1921, Prohibiting the Delegation of Legislative Power to the Executive Department.

A further objection to the construction which defendants seek to place on the Conservation Statutes is that if so construed the Conservation Statutes are such a delegation of legislative power as is forbidden by the Louisiana Constitution. This conclusion follows, it is submitted, from the decision of the Supreme Court of Louisiana in *State* v. *Billot*, 154 La. 402; 97 So. 589. The court there held that the provision of Section 4 of Act 204 of 1912, authorizing the Conservation Commission to fix the open season for killing deer, but requiring that such season should not be less than two nor more than five months, was void because it delegated legislative power in violation of Article II of the Constitution of 1921. The court said (p. 403):

> "Neither of the acts fix a definite open season for the hunting of deer or a definite closed season during which deer shall not be killed. Section 4 of Act 204 of 1912 provides for an open season not exceeding five months in any one year, and it definitely fixes the months of November and December as two of the months of the open season. With reference to the other months of the open season, of the beginning and end of the duration thereof, the act vests the conservation commission with the power and authority to determine and fix or vary it as may best suit the conditions of the several parishes.
>
> "Vesting the conservation commission with this power and authority is clearly a grant of legislative power.
>
> "The conservation commission is a branch of the executive department of the state government. Article 5 of the Constitution of 1921 is, in part, as follows:

"'Section 1. The executive department shall consist of a Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State, Register of the Land Office, Commissioner of Agriculture and Immigration, and Commissioner of Conservation.'

"Article 2 of the Constitution of 1921, which is the same, in substance, as articles 16 and 17 of the Constition of 1898, is as follows:

"'Section 1. The powers of the government of the state of Louisiana shall be divided into three distinct departments—legislative, executive and judicial.

"'Section 2. No one of these departments nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.'

"The framers of the Constitution never intended that the Legislature should delegate any of its legislative powers to the conservation commission, and this intention is unequivocally expressed in section 1 of article 6 of the Constitution of 1921.

"'Section 1. The natural resources of the state shall be protected, conserved and replenished; and for that purpose shall be placed under a department of conservation, which is hereby created and established. The department of conservation shall be directed and controlled by a commissioner of conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the state, and to prohibit and prevent the waste or any wasteful use thereof.'

"The intention expressed is clear.

"'The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the state.'

"As the Legislature has not fixed an open season in which wild deer may be killed or a closed season in which they may not be hunted, it follows that no statute

> of the state has been violated, and, as the Legislature could not vest the conservation commission with legislative power, the indictment against the accused must fall."

If, as held in the Billot case, the Legislature of Louisiana cannot delegate to the Commissioner of Conservation the right to fix the open season for wild deer, then it certainly follows that such Legislature cannot delegate to the same officer the right to legislate as to whether or not the carbon black industry shall be confined to those persons now engaged therein.

In the case of *State* v. *Thrift Oil Company*, 162 La. 166; 110 So. 88, the Supreme Court of Louisiana has had before it the question whether or not Section 2 of Act 91 of 1922 contains an unconstitutional delegation of power. This is the section which authorizes the Commissioner to fix the percentage of gas from each well which may be used in the manufacture of carbon black. The statute prescribes a maximum of 20 per cent and a minimum of 15 per cent of the potential capacity of the well. The court found it unnecessary, however, to determine the constitutional question thus raised.

The Thrift Oil and Gas Company was convicted for an overdraft of gas in violation of Acts 91 of 1922 and 252 of 1924. One of the defenses was that the provision of Section 2 of Act 91 of 1921, granting to the Commissioner of Conservation the authority to fix the percentage of gas to be used in the manufacture of carbon black at not less than fifteen nor more than twenty per cent., violated the prohibition of Article II of the Constitution of 1921 against the delegation of legislative power. The court, on the first hearing, affirmed the conviction and rejected this contention of appellant. On rehearing, however, the conviction was set aside; and the court specifically held that it was unnecessary to pass upon this constitutional question, as the appellant was entitled, under Act 252 of 1924, to take gas in excess of the

quantity that it had actually taken (p. 194). The *Thrift Oil* case is, therefore, no authority against our position; indeed, even the opinion handed down on the first hearing stressed the fact that "the Legislature has been careful not to leave the fixing of the percentage of gas to be used from wells to the mere arbitrary discretion of the Commissioner of Conservation" (p. 170). In any event, the decision could hardly determine the question for the reason that the Commissioner had fixed the percentage at the legal maximum of twenty per cent., *State* vs. *Carson Carbon Co.*, 162 La. 781; 111 So. 162.

There may be some doubt as to whether the Legislature could not delegate to the Commissioner of Conservation the right to fix within specified limits, the amount of gas to be taken. There can, however, be no question that the Legislature cannot delegate to the Commissioner of Conservation the right to decide whether the carbon black industry should be abolished, or whether it should be confined to those already engaged therein. This would clearly be a delegation of legislative power and would fall within the prohibition of Article II of the Constitution of 1921.

IV.

The order of the Conservation Commissioner is contrary to the Fourteenth Amendment.

At the very outset of the discussion of plaintiff's rights under the Fourteenth Amendment, he is met by the specious argument, advanced on brief in the court below, that his gas rights are not property at all, and so are not protected by the amendment. Under the law of Louisiana, say the defendants, gas in place belongs to the state, so that the owner of the surface has no property right to be protected.

The argument is patently fallacious. If the state owned the gas, it could prohibit its export, as it can prohibit the export of game. *Geer* vs. *Connecticut*, 161 U. S. 519. But

that it cannot prohibit, or restrict, the export of gas from its borders is clear. *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania* v. *West Virginia*, 262 U. S. 553. While because of its peculiar character, the police power of the State may extend to the regulation of the production or use of the gas (*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190), it by no means follows that the State is the owner of the gas it regulates. The doctrine that minerals, whether precious or otherwise, are the property of the sovereign has never obtained in Louisiana, or, for that matter, in the United States.

There is no basis in the law of Louisiana for any such conclusion. True, Louisiana does not adopt the view, held in some states, that the owner of the surface *owns* in severalty the oil and gas under it. *Brown* v. *Spilman*, 155 U. S. 665, 670; *Westmoreland, etc., Natural Gas Co.* v. *DeWitt*, 130 Pa. 235, 249; *Gas Products Co.* v. *Rankin*, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294. Louisiana adopts the more generaly accepted view that the owner of the surface has "the right to extract such minerals from the soil," as from a common reservoir, excluding others from exercising a like right on his premises. *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 150 La. 756, 858; 91 So. 207. Whether this right be denominated an incorporeal right, a real right or a servitude, whether it be realty or personalty, it is in any case *property*. *Bodcaw Lumber Co.* v. *Cox*, 159 La., 106 So. 313. *Waggoner Est.* v. *Wichita County, supra*. When the gas itself is reduced to possession, as by drilling a well to and into the producing sand, title vests as fully as in the case of any other property. In the leading case on the subject, *Frost-Johnson Lumber Co.* vs. *Salling's Heirs, supra*, page 858, the Supreme Court of Louisiana notes "with much satisfaction" that with regard to the nature of oil and gas rights "our jurisdiction is in complete harmony with that which prevails throughout the land," citing *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, and *Walls* v. *Midland Carbon Co.*, 254 U.

S. 300. So much for the contention that the law of Louisiana is peculiar and whittles the plaintiff's gas rights down to something so small that the Fourteenth Amendment cannot see them.

That this right, like other property rights, can be curtailed by the state in the exercise of its police power is, of course, conceded. *Ohio Oil Co.* v. *Indiana, supra; Walls* v. *Midland Carbon Co., supra.* The question is the kind, as well as the extent, of impairment, which is allowable. The answer to this question involves a discussion of the grounds on which the impairment is permitted. And any such discussion properly centers around *Ohio Oil Co.* v. *Indiana, supra.*

That case concerned the constitutionality of the Indiana statute, prohibiting the owners of gas or oil wells from permitting the gas to escape into the open air. The court sustained the statute, as a measure of protection to the owners of the rights in the gas, considered collectively. Mr. Justice White, announcing the opinion of the court, expounded the nature of the rights involved. The surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath.

But the nature of gas is such that the use of his right by one surface owner may result in his obtaining an undue proportion of the common fund of gas, to the detriment, or even annihilation of the rights of the others. The legislature, therefore, has the right to protect all of the collective owners against the depredations of some, in order to secure "just distribution to arise from the enjoyment by them of their privilege to reduce to possession." "Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana, which is here attacked because it is asserted that it divested private property without due compensation, in substance is a statute protecting private property and preventing it from being taken by one of the common owners, without regard to the enjoyment of the others."

Mark the contrast between the Indiana Statute and Dr. Irion's order. The Indiana statute forbids waste by anyone who has a right to take from a common source of supply, and thus protects the others who have a coequal right. Dr. Irion denies the coequal right of each; he purposes to prohibit to one the identical use of the right (be it considered a wasteful use or not) which he permits to the others. The basis of the Indiana Statute itself condemns Dr. Irion's order. How can that order be reconciled with the proposition that

> "The surface proprietors within the gas field *all* have the right to reduce to possession the gas and oil beneath. ***They could not be absolutely deprived of this right, which belongs to them, without a taking of private property.***"

The basis of this court's decision in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., 61, is the same as that of the *Ohio Oil Co.* case. The subject matter there was carbonic acid mineral waters, and the statute prohibited pumping under conditions deemed wasteful. The statute was held to be constitutional.

> "It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, *consistently with the continued existence of that right*, so regulates its exercise as reasonably to conserve the interests *of all who possess it*" (p. 77).

The italics, which are ours, sufficiently differentiate the New York Statute from Dr. Irion's order.

The basis of these two decisions, then, is that the Statutes are reasonable embodiments of the principle, "*sic utere tuo ut alienum non laedas.*" That such was the *ratio decidendi* was reiterated in *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229. Discussing the Ohio Oil Co. case, Mr. Justice McKenna said (p. 254):

> "The statute of Indiana was directed against waste of the gas, and was sustained because it protected the

use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it, a reduction to possession and property, not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession they could not be deprived of any right which attached to it when in possession."

The same view was adopted in *Walls* v. *Midland Carbon Co.*, 254 U. S. 300. That case sustained the validity of the Wyoming Statute which provided that natural gas, occurring within ten miles of an incorporated town or industrial plant, should not be consumed in a process which did not utilize the heat. Mr. Justice McKenna, in announcing the court's decision, said (p. 319)

> "The determining consideration is the power of the State over, and its regulation of *a property in which others besides the companies may have rights* and in which the State has an interest to adjust and preserve, natural gas being one of the resources of the State. And in this consideration it is more important to consider not for what a particular owner uses the gas, but the prevention of his use to that of others, or it may be the prevention of use by others; * * * *Walls* v. *Midland Carbon Co.*, *supra*, page 319, (italics ours).

The theory of all the cases, then, is: Gas rights are property in a peculiar kind of mineral. The physical character of the mineral is such that waste by one property owner injures the others. The state may properly protect the property of all against waste by a few. The question here is whether the Commissioner's order is reasonably calculated to

accomplish this end. We proceed, therefore, to a consideration of that issue.

Unfortunately, we are in the dark as to the reasoning of the court below on this point; it merely posed the question without discussing it. It concludes its opinion as follows (R., 37):

> "A statute or ordinance depriving one of his liberty or property, is not in violation of the 14th Amendment merely because of such deprivation; nor is every classification made under the police power of a state voidable therefor; the test is that to be valid they rest upon some reasonable public policy and some real and substantial relation to the object sought to be accomplished; and every presumption is in favor of the rightful exercise of its power by the legislature or officer acting under its authority.
>
> "From these considerations it follows that the complainant's bill must be dismissed."

Let us apply the court's test of validity to Dr. Irion's order. Does his classification into old and new manufacturers of carbon black "rest upon some reasonable public policy"? Has the prohibition of all new carbon plants, without the suppression of the old ones, "some real and substantial relation to the object sought to be accomplished"?

In the Indiana case the practice aimed at was that of throwing the gas away in order to get the oil more cheaply. It is clear that the prohibition of this practice conserved the gas for the benefit of all the owners. The New York case is, in a way, the converse of the Indiana case; as the Indiana oil operators were tempted to waste the gas in order to get the liquid more cheaply, so the owners of the surface of Saratoga Springs were wasting the liquid mineral water in order to get the carbonic gas more cheaply. It is clear that the suppression of that waste, as well as the prohibition of deep well pumps, served to conserve the common supply of all the owners.

The Midland Carbon Company case appears to us less clear. It is to be noted, in this connection, that three justices dissented from that decision (among them the authors of the opinions regarding the Indiana and New York statutes), and that it was not followed by the Montana Supreme Court in passing on an almost identical statute. *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294. We take it that the case marks the frontier in this domain of the law. The case holds that the state may prohibit the consumption of natural gas for purposes which do not utilize its heating qualities in a neighborhood where its use as fuel is reasonably economical. The decision rests on the proposition that the prohibition of the more wasteful use (making carbon black) conserves the gas in the ground so that it may later be used less wastefully as fuel.

Such conservation is accomplished by a suppression of the wasteful use either in whole or in part. If the suppression is incomplete, it may be confined to certain areas, as in Wyoming, or the consumption of all wells may be limited to a given percentage of their capacity, as is done in Louisiana. But conservation is not achieved by the suppression of the wasteful use at one well, while the neighboring well continues the wasteful use. One well consuming two million cubic feet of gas wastes as much gas as two wells each consuming one million cubic feet. Conservation is by limitation of total output, not by limitation of the number of wells.

That this is not mere theory is attested by the statistics of the Bureau of Mines. It is not merely possible for fewer wells to burn more gas; such has been the fact. In 1926 there were ten per cent. fewer carbon black plants than in 1923, but they burned ten per cent. more gas.*

The last two years have seen a diminution in the quantity of gas made into carbon black, but this is the result more of reduced consumption per plant than of a reduction in the number of plants. Louisiana burned ten billion cubic feet

(*) Mineral Resources of the United States, 1926—Part II, page 15.

less gas in 1926 than in 1925, with the same number of plants, and they produced *more* carbon black.*

The order directed against this plaintiff specifically will not in any event conserve gas. The plaintiff wants to make carbon black for the Johnson Company, a manufacturer of printer's ink, in which he is interested. Carbon black is an essential ingredient of printer's ink. If the Johnson Company does not buy carbon black from the plaintiff it will buy it from one of the plaintiff's neighbors in the Monroe gas field. Louisiana gas, possibly gas drawn from beneath plaintiff's land, will be burned to produce it; the only difference is that the Johnson Company may have to pay monopolistic prices to the combination of manufacturers who are now in the field.

It is submitted, then, that the ban on new carbon black plants has no "real and substantial relation to the object sought to be accomplished," because (1) it does not conserve gas, and (2) it does not conserve, but on the contrary destroys the coequal interest of all the owners of gas rights. Instead of commanding that no owner shall use an undue proportion of the gas in the common reservoir, it postulates that some, the newcomers, may not use even a due proportion. That it is not intended by the defendants to protect the property of all the owners of gas rights, is attested by the argument advanced by them, that plaintiff has no property to protect. That the order complained of offends against the rule of the *Ohio Gas Co. case*, is sufficiently conceded by defendants' effort to distinguish the cases on the ground that the law of Indiana differs from that of Louisiana.

The court below pointed out that the complainant's bill "does not sufficiently show that the refusal of a permit made any distinction between himself and any other persons who have been so denied *since the adoption of the Commissioner's policy or rule*" (R., 37). It is not contended that such a distinction has been made; i. e., that after adopting the rule the Commissioner gave a permit for some new plants but denied

a permit to complainant. Presumably he has adhered to his rule, which is to prohibit ALL new plants. His discrimination is between plants in operation at the time of the announcement of the rule, and those not yet in operation. Does such a classification "rest upon some reasonable public policy"?

We submit that a lawful classification under a conservation measure must bear a reasonable relation to the geologic and economic facts. Such is certainly true of the Conservation Statutes we have been considering. The Indiana Statute prohibiting the escape of gas applied to all. The New York Statute distinguished between surface wells and wells drilled into the rock which tapped a deeper source. In the Wyoming Statute the distinction was between urban and industrial sections (defined as wells within ten miles of an incorporated town or industrial plant), where the use of gas as a fuel was economically practical, and rural sections, where there was no demand for fuel.

But a distinction between an owner of a well who has already built a carbon plant, and an owner who has not yet set up his equipment has no conceivable geological significance. Its only economic effect would be to prevent the erection of two plants to burn the gas which one plant had burned before, or, in other words, to prevent complainant from investing his money in the buildings and equipment which he considered it to his advantage to erect.

The order complained of is to be distinguished from classifications having a superficial resemblance. To require of persons entering a profession a demonstration of their fitness which is not required of persons already established is reasonable "upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest." *Watson* v. *Maryland*, 218 U. S. 173, 177. *Per contra*, an old carbon black plant consumes gas as wastefully as a new one, and perhaps more so.

If there is not room for two so that either the established business must go or the newcomer must be kept out, it is rea-

sonable to prefer the established concern. Thus, in the days of liquor licenses, it might be reasonable to refuse a license for a new saloon on the northeast corner while permitting the old saloon on the northwest corner to continue, although even that discrimination was forbidden in Louisiana. *Town of Mandeville* vs. *Band, supra; State ex rel. Galle* v. *New Orleans, supra.* But there is no such crowding in the case of the carbon black manufacturers. Dr. Irion's order is more comparable to the prohibition of a new *brewery* while the old brewer continues to make beer and sell it to the same saloon the newcomer desires to sell to.

Geologically and economically, complainant and his neighbors are in the same class. Discrimination between them is unreasonable classification and would be unconstitutional even if the Statute itself made the distinction.

But in point of fact, the legislature has made no such classification. On the contrary, its language shows a clear intention that all owners of gas rights should be treated equally. Section 2 of Act 91 of 1922, which authorizes the Commissioner of Conservation to fix "what percentage of consumption of natural gas produced by *each* gas well may be used in the manufacture of carbon black," provides that "in fixing such basis of consumption *the same rule as far as possible shall be applied to all gas wells in any producing gas area.*"

The Act of 1924 classifies the wells according to the acreage of the tract, with a minimum of one million cubic feet. It makes this distinction between new wells and old; that if for a given well, drilled before June 24, 1924, the new classification reduced the permissible consumption below the 1922 quota, that well could use the 1922 quota. The constitutionality of this distinction between new and old wells there is no occasion to discuss, for the reason that the Commissioner of Conservation declines to put it into effect. A few months after the passage of this act, he announced in substance that new wells would be allowed a quota of zero per cent. instead of that named in the statute.

The classification of the Commissioner which runs thus counter to the classification contained in the statute must necessarily be more obnoxious to the constitution than if the statute contained no classification at all. The Commissoner is trying to enforce Section 4 of the Act of 1924, which reads "the Commissioner of Conservation shall determine [in accordance with the above rules] the allowable percentage that each gas well may produce," as if the words in brackets were omitted. Similarly, he considers it his duty under Section 6 "to make and enforce rules and regulations for the conservation of the gas of the State [not in conflict herewith]." It is under this construction of the Statute that its constitutionality must be examined. *Toucey* v. *Eisner*, 245 U. S. 418, 421.

The court below felt that "the constitutionality of a statute must be determined by its provisions and not by the manner in which it is in fact administered" (R., 37). We had supposed that the contrary was well established.

> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373.

See *Gorieb* v. *Fox*, 47 Sup. Ct. 675, 676.

If, then, the Statute gives the Commissioner of Conservation power to permit one man to manufacture his gas into carbon black and to refuse that permission to another, without prescribing any rule to guide that administrative officer in the exercise of his power, the Statute clearly offends against the Fourteenth Amendment.

> "When we consider the nature and the theory of our institutions of government, the principles on which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins*, *supra*, pp. 369-370.

The power exercised by the Board of Commissioners of San Francisco in withholding their consent for the establishment of laundries to Chinese, while granting it to Caucasians is hardly more "purely personal and arbitrary" than that of the Commissioner of Conservation, who has agreed with the established manufacturers to let them control the total output of carbon black, while withholding permits from all newcomers (R. 10).

State v. *Carter*, 159 La. 121, 105 So. 247, is a recent Louisiana case which declares unconstitutional a provision of the automobile law similar to the Conservation Statute, as interpreted by the Commission. The statute provided that

> "Except by special permit from the commission (meaning the Louisiana highway commission), no passenger motor transfer of more than seven passengers carrying capacity shall exceed a speed limit of twenty-five miles per hour."

The court held

> "A statute or an ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right by granting or withholding a license or permit or approval, arbitrarily or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment" (p. 247).

V.

An injunction to restrain the Conservation Commissioner and Attorney General of Louisiana from interfering with the use of complainant's property in the manufacture of natural gas into carbon black is the proper remedy to be pursued.

Assuming that the Commission's order infringes complainant's rights, what procedure is appropriate to protect him? He has filed a bill in equity to restrain the defendants, the Commissioner of Conservation and the Attorney General (1) from interfering with the erection of a factory by complainant, and with the subsequent manufacture of carbon black therein, (2) from instituting any suit, civil or criminal, against complainant, by which to penalize him or interfere with such erection of a plant or manufacture therein.

The lower court held that the first prayer was tantamount to a prayer for the issuance of a writ of mandamus, which is beyond the jurisdiction of the federal court, and that the second prayer came within the ban of Section 265 of the Judicial Code (R.,34-36). The court also suggests that the proceedings are directed against the State of Louisiana and therefore contravene the Eleventh Amendment, but it is not clear whether or not the court rests its dismissal of the bill on that ground (R., 36).

It is believed that the court's suggestion that the proceeding is in effect an attempt to accomplish the same end sought by mandamus presents no real obstacle. Mandatory injunctions, of the kind here sought, are a recognized form of equitable remedy. In *Mutual Life Ins. Co.* v. *Boyle*, 82 Fed. 705, such an order was entered in a case strikingly like the present.

The court below recognized that Section 265 of the Judicial Code does not prevent a court of equity from restraining

criminal proceedings under a void statute or ordinance where property rights are threatened. But it held that property rights would not be destroyed by the proceedings threatened by defendants (R., 30). Notwithstanding this last finding, it is submitted that the defendants' threat to "use all legal means at their command to prevent the manufacture of carbon black without a permit" (R., 18) does threaten complainant's property.

In the first place, it destroys the only practicable use of the gas which complainant has actually reduced to possession. The destruction of the use is in effect the destruction of the property. Next, it impairs the value of complainant's gas rights; for the daily drafts made by complainant's neighbors on the common fund of gas are gradually eating away complainant's principal. Finally, it denies complainant practically all income from his land; for the land which cost complainant a large price has no substantial value except for the use which defendants are trying to prevent.

Under such circumstances it seems clear that the criminal and civil proceedings which are prayed to be enjoined *would* destroy property. Moreover the penalties which the defendants assert the right to enforce against the plaintiff accrue at a maximum rate of ten thousand dollars a day and may be followed by the forfeiture of all right to do business within the state. It would be hard to write confiscation in plainer terms. *Dobbins* vs. *Los Angeles*, 195 U. S. 223; *Ex Parte Young*, 209 U. S. 123, 155; *Truax* v. *Raich*, 239 U. S. 33, 37; *Terrace* v. *Thompson*, 263 U. S. 167, 214.

The situation here presents the same possibilities of harassment by means of arresting employees for violation of the orders of the Conservation Commissioner as was made the basis of equitable relief in *Dobbins* v. *Los Angeles*, *supra*, page 241. And the injury to complainant's property is clearly more direct and immediate than that which moved the court to issue its injunction in *Truax* v. *Raich*, *supra*. In that case an alien employee sought to have the Arizona officers

enjoined from enforcing a statute which penalized employers of aliens under certain circumstances. It is submitted that the following language from *Ex Parte Young*, 209 U. S. 123, 155, exactly fits this case.

> "Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

VI.

The right to proceed by mandamus in the State Court, if it exists, is not such an adequate remedy at law as to deprive complainant of his right to equitable relief in the Federal Court.

Defendants urged on brief below that complainant's proper relief was to apply for a mandamus compelling the Commissioner to issue a permit. Whether or not such a writ would lie in the state court, it certainly does not lie in the federal court. *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109. And it is well settled that the remedy at law which will defeat federal equity jurisdiction must be one which can be afforded in the federal courts. *Miss. Mills* vs. *Cohen*, 150 U. S. 202; *Smyth* v. *Ames*, 169 U. S. 466.

VII.

This is not a suit against the State of Louisiana within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States.

Finally we meet the contention that this bill is in reality a suit against the State of Louisiana and therefore contravenes the Eleventh Amendment. As we have said, we are not clear whether the lower court did or did not consider this action a suit against the state. It says that "if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the State are not considered as representing the State, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the state" (R., 36).

This description fits the case at bar. The citation of authorities is hardly needed for the proposition that "a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconsitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment."

Smyth v. *Ames*, 169 U. S. 466, 518;
Truax v. *Raich*, *supra*;
Pierce v. *Society of Sisters*, 268 U. S. 510.

The court below, in accordance with the contentions of the defendant, attempted to distinguish the instant case from this long line of decisions by this Court on the ground that in the instant case the complainant anticipates merely a wrongful construction of the Statute and does not plead the unconstitutionality of the Statute. But the bill does plead in the most express terms (Paragraph XVIII, R., 8) that the statute, as it has been construed by defendants, is unconstitutional both under the constitution of the State of Louisiana and under the 14th Amendment to the Constitution of the United States. The situation exactly fits the reasoning of Mr. Justice Holmes in *Tourne* v. *Eisner*, 245 U. S. 418, 425.

"The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this court should think that the construction would make the act unconstitutional. While it keeps the money it opens the question whether the act construed as it has construed it can be maintained."

CONCLUSION.

The decree of the District Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

John W. Davis

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APPENDIX.

Statutes and Portions of Statutes of the State of Louisiana Relevant to this Case.

Act 250 of 1920.

An Act granting to the Department of Conservation, created by laws of Louisiana, greater power and authority in the work of conserving the crude petroleum, natural gas and mineral substances mined or produced in the State of Louisiana, giving to the Department of Conservation power and authority to adopt and promulgate, amend and re-adopt, rules and regulations for the drilling, development, sinking, deepening and abandonment of natural gas and oil wells, and to promulgate rules and regulations for the opening and operation of all mines in the State of Louisiana; and to prescribe rules and regulations regulating the production and use of natural gas, and requiring that the gasoline contained in the natural gas used by carbon plants be extracted and saved before such gas be utilized for the making of carbon; empowering and authorizing the Department of Conservation to take charge of, control, or securely cap or plug any natural gas well or oil well wasting oil or gas and not in control; providing for proceedings in the exercise of this authority; and giving a lien and privilege in favor of the Department of Conservation for all reasonable expenses and costs incurred by it, or under its authority, in the closing, capping or plugging of any such uncontrolled or wild well, and extending this lien and privilege to all leases, property and equipment owned by the company, firm or individual owning such wild well, and defining the word "waste" as used in this act; and requiring persons, associations and corporations mining, drilling or operating oil or gas wells or mines to report to the Department of Conservation from time to time on the

output of such well or mines; prescribing penalties for the violation of this Act and the rules and regulations of the Department of Conservation adopted pursuant hereto; and limiting the amount of fine or term of imprisonment that may be imposed; authorizing and empowering the Department of Conservation to resort to courts for legal, equitable or criminal process to compel obedience and compliance with its rules and regulations; and to enforce any of the provisions of this Act; authorizing the Department of Conservation to appeal from any judgment or decree against it, or any order restraining the Department in the exercise of its authority; granting the right to appeal to any person, association or corporation from any judgment, order or mandate of the Department of Conservation directed against it; and authorizing the determination of the reasonableness of the orders, rules and regulations of the Department of Conservation in any court of competent jurisdiction at the timely instance of any party affected thereby and conferring jurisdiction therefor; making it the duty of the Attorney General, on request, to represent the Department of Conservation, and authorizing the appointment of a District Attorney to appear instead of the Attorney General, under certain conditions; declaring all legal proceedings hereunder to be preference matters entitled to summary trial and disposition in courts of competent jurisdiction; providing for appropriations of funds necessary for the enforcement of this Act, and regulating the issuance of injunctions restraining the Department of Conservation in its control of wild gas wells and providing for injunction bonds therewith.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the Department of Conservation, created by the laws of the State of Louisiana, acting through the Commissioner of Conservation, is hereby empowered and directed to adopt and promulgate, pursuant to the provisions of the Constitution and laws of the State of Louisiana and

of this Act, such rules and regulations as said Department may deem necessary for the conservation of the crude petroleum, natural gas and mineral substances produced in the State of Louisiana, and to provide rules and regulations for the drilling, development, sinking, deepening, abandonment and operation of oil wells, gas wells and mines for the purpose of conserving the products produced therefrom, and to prevent the waste of such products, and to require persons, associations and corporations mining, drilling or operating such well or mines to report to it from time to time on the output of the wells or mines being operated by them.

Section 2. Be it further enacted, etc., That the Department of Conservation is authorized by the grant of power in this act to prescribe rules and regulations requiring that the gasoline contained in natural gas used by carbon plants be extracted and saved before such gas be utilized for the making of carbon, where such gas contains sufficient gasoline to make the extraction thereof beneficial or profitable.

Section 3. Be it further enacted, etc., That the Department of Conservation be and it is hereby given supervision over the production and use of natural gas in connection with the manufacture of carbon black, in other manufacturing enterprises and for domestic consumption; and that power and authority is hereby granted to the Department of Conservation to prepare and promulgate all necessary and reasonable rules and regulations providing for the conservation of natural gas produced for and used in plants manufacturing carbon black, in other manufacturing enterprises and for domestic consumption; hereby especially granting to the Department of Conservation the power to limit the amount of gas which may be withdrawn from all the gas wells in any particular gas field or area to a percentage of the potential capacity of such gas wells as may be reasonably necessary to conserve and safeguard an adequate supply of natural gas.

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Section 11. Be it further enacted, etc., That the Department of Conservation acting through the Commissioner of Conservation, shall have power to amend, re-adopt, and prescribe new rules and regulations, from time to time, whenever in the judgment of the said Department the same are necessary.

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ACT 91 OF 1922.

An Act to regulate and control the use of natural gas in the manufacture of carbon black, and to prescribe penalties for the violation of this act.

Section 1. Be it enacted by the Legislature of Louisiana that natural gas may be used in the manufacture of carbon black under the conditions as fixed and imposed by the provisions of this act.

Section 2. That the Commissioner of Conservation is authorized, directed, and empowered to fix and determine on the 1st day of October, 1922, and semi-annually thereafter, what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black, said percentage of consumption to be based upon the potential capacity of such gas well, and which percentage shall not be less than fifteen per cent. and not more than twenty per cent. of the potential capacity of such well, provided that in fixing such basis of consumption the same rule, as far as possible, shall be applied to all gas wells in any producing gas area, and provided further, that the percentage of consumption may be increased in any particular well when the safety of such well may demand such increase.

Section 3. That the Commissioner of Conservation is authorized, empowered, directed, and required to reduce the consumption of natural gas used in the manufacture of carbon

black below the minimum fixed in Section 2 of this Act, after promulgation for sixty days of an order to that effect, whenever it is actually necessary to do so in obtaining an adequate supply of natural gas for domestic heating and lighting purposes in the State of Louisiana, and for manufacturing plants, industries and enterprises located and operated within the State of Louisiana, other than those engaged in the manufacture of carbon black; provided that the conditions set out in this Section shall not become effective until such time as the establishment of factories, industrial plants, and enterprises, the construction of pipe lines in the State of Louisiana, and domestic consumers in Louisiana, or any one of such shall provide a demand which necessitates the enforcement of the same.

Section 4. That no person, partnership, firm, corporation, or association of persons shall be permitted to use natural gas in the manufacture of carbon black without extracting and saving therefrom the gasoline contained therein, provided the amount of gasoline therein contained shall not be less than one hundred and fifty gallons to the million cubic feet of gas, such content to be based on the amount of gasoline actually recoverable by modern extraction plants as generally operated; and provided further that the Commissioner of Conservation may suspend the operation of this Section in case of emergency.

Section 5. That the Commissioner of Conservation is authorized, empowered, and directed to make, adopt and promulgate orders, rules and regulations, which in his judgment may be necessary for the proper carrying out of the provisions of this act.

Section 6. That it shall be the duty of the Commissioner of Conservation to enforce the provisions of this Act and the orders, rules and regulations made, adopted and promulgated by him.

Section 7. It shall be the duty of the Department of Justice to represent said Commissioner in the enforcement of the provisions of this Act, and of the orders, rules and regulations made, adopted and promulgated by said Commissioner of Conservation.

Section 8. That any person, partnership, firm, corporation, or association of persons violating any of the provisions of this Act, or any rule, regulation or order of the Commissioner of Conservation prescribed by authority of this Act, shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, in the discretion of the Court, and each and every day in which any person, partnership, firm, corporation, or association of persons shall violate any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, shall constitute a separate offense hereunder and subject the offender to the penalty herein provided; and three convictions for violating any of the provisions of this Act, or any such rule, regulation, or order of the Commissioner of Conservation, shall subject the offender to the forfeiture of the right to manufacture natural gas into carbon black, at the suit of the Commissioner of Conservation before a Court having jurisdiction at the place where such offenses are committed, and the Court may, in its discretion, decree such a forfeiture.

ACT 134 OF 1924.

An Act prescribing the authority and power of the Commissioner of Conservation in the direction, control, and preservation of the mineral resources of the State.

Section 1. Be it enacted by the Legislature of Louisiana, That wherever in the laws prescribed for the severing and conservation of the mineral resources of the State a certain discretion is vested in the Commissioner of Conservation in the matter of issuing permits and making contracts and

agreements for severing, the same shall not be exercised except on the approval of the Attorney General and the Governor.

ACT 252 OF 1924.

An Act to conserve the natural gas resources of the State of Louisiana; to define the conditions under which natural gas can be burned into carbon black; to establish rules and regulations for the drilling for and the production of gas; to provide for the spacing of gas wells and to limit the percentage of the open flow capacity of gas wells that may be taken from such wells and to fix the maximum percentage that may be taken from them; to give the Commissioner of Conservation of this State authority to make rules and regulations for the conservation of the natural gas resources of the State; to make it a misdemeanor to violate any of the provisions of this Act, and to provide penalties therefor; and to provide for bringing corporations into court in criminal prosecution under this Act.

SECTION 1. Be it enacted by the Legislature of Louisiana, That natural gas shall not be produced in the State of Louisiana in such manner, and under such conditions as to constitute waste. The term "waste," as herein used, in addition to its ordinary meaning shall include: (1) escape of gas in commercial quantities into the open air from a stratum recognized as a gas stratum, but it is not intended to have application to gas pockets in high points in a stratum recognized as an oil stratum; (2) drowning with water of a gas stratum capable of producing gas in commercial quantities; (3) underground waste; (4) wasteful burning of any gas well; (5) wasteful utilization of gas; (6) and allowing gas wells or pipe lines to leak or blow off.

Section 2. The following rules and regulations shall be observed in drilling for, producing, taking, transporting, piping, and using gas in this State:

1. No gas well shall be drilled in this State without a written permit therefor from the Commissioner of Conservation designating the location of the proposed well.

2. Whenever natural gas in commercial quantities, or a gas-bearing stratum known to contain natural gas in such quantities is encountered in any well drilled for oil or gas in this State, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters.

All operators, contractors, drillers, pipe line companies, gas distributing companies or individuals, drilling for or producing gas, or piping gas for any purpose, shall use every reasonable precaution in accordance with the most approved methods to stop and prevent waste of gas in drilling and producing operations, or distributing the same, and shall not wastefully utilize gas, or allow it to leak or escape from natural reservoirs, wells, pipe lines, or other containers.

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Section 4. The Commissioner of Conservation shall determine in accordance with the above rules the allowable percentage that each gas well may produce, and such determination shall protect the gas producer from any of the penalties by this Act provided; and the failure of the Commissioner of Conservation to determine in advance the allowable quantity that each well may produce shall authorize the gas producer to determine such percentage without incurring the penalties provided by this Act, and where a well is drilled on land not sectionized by governmental survey, or where under any other conditions no rule is laid down for determining the open flow capacity that any well or wells may be allowed to produce, such wells shall be allowed to produce approximately the same percentage that they would if the land had been regularly sectionized, and the Commissioner of Conservation shall fix the allowable percentage that such wells may be allowed to produce in conformity to this rule.

It shall be unlawful for any person, firm, corporation, or association of persons to take more gas from any well for a period of seven consecutive days than the maximum production allowed to be taken from such well would amount to for the same period, or to take more gas from any well in any one day than one and one-half times the allowable production of such well, or to take any gas whatever from any gas well when the working pressure of such well is less than one-half the closed pressure of such well, and provided that the working pressure of any well can not be reduced below 200 pounds regardless of what the closed pressure is, and provided further than in all fields where the rock pressure is less than 200 pounds and the gas is being produced, sold and transported for domestic and industrial fuel purposes exclusively the back pressure herein provided for shall not apply where artificial means are employed to produce and market the gas from such fields and when the rock pressure of such fields is less than 150 pounds the withdrawal percentages provided for herein shall not apply.

When in his judgment he thinks it necessary to conserve the gas in any well or in any area, or to protect any person from financial loss, the Commissioner of Conservation may increase or decrease the percentage of the open flow capacity that may be taken from any gas well or wells, as he may increase or decrease the working pressure required to be maintained in such gas wells.

Section 5. The Commissioner of Conservation may grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act 91 of 1922, except that the percentage of the open flow capacity of gas wells that may be utilized in burning carbon black shall be controlled by this Act when the production of such wells is controlled by this Act and by Act 91 of 1922 when the percentages that such wells may produce is controlled by said Act 91 of 1922. Such permits shall only be granted to bona fide applicants and which permits shall automatically expire one year after date of issue.

Where gas is burned into carbon black in this State it must be burned economically and efficiently.

No gas whatever shall be piped out of the State and burned into carbon black in another State.

1. Each and every carbon black manufacturer and gas producer shall make a report in duplicate to the Commissioner of Conservation on or before the twentieth day of each month showing the total amount of gas sold or consumed, the amount of gas burned into carbon black, and the amount and kind of carbon black produced during the preceding month.

2. The Agents of the Department of Conservation shall, at all times, have access to any carbon black plant for the purpose of obtaining any and all information necessary to the carrying out of the provisions of this Act, and it shall be the duty of those in charge of such carbon black plants to furnish such Conservation Agents with such information.

3. No permit shall be granted, and the Commissioner of Conservation is without authority to grant a permit for the construction of a new carbon black plant except upon written application on forms prepared by the Department of Conservation, in which application the applicant shall state that he, they or it, willfully and completely abide by and comply with all of the provisions of this Act, and with all the rules and regulations of the Commissioner of Conservation established under the provisions of this Act.

4. A monthly report, not later than the 20th of each month, shall be furnished the Department of Conservation showing the total amount of gasoline extracted from gas during the preceding month. This report shall be made by each operator extracting gasoline from gas.

5. The Commissioner of Conservation shall compile monthly reports from the reports furnished by the producers showing the total amount of gas produced, carbon made, and gasoline extracted, which totals shall be open to the public but the individual reports shall not be open to public inspection. All gas meter reports shall be public records.

Section 6. It shall be the duty of the Commissioner of Conservation to make and enforce rules and regulations for the conservation of gas of this State not in conflict herewith. He shall have authority to prevent the waste of gas in drilling and producing operation and in the piping and distribution thereof, and to make rules and regulations for that purpose. It shall be his duty to require dry or abandoned wells to be plugged in such a way as to confine oil, gas or water to the stratum in which they are found, and to prevent them from escaping into other strata, and to establish rules and regulations for that purpose. He is empowered to establish rules and regulations for the location and spacing of wells, and the amount of gas that may be drawn from any well or wells, not in conflict with this Act, or any other law of this State.

It shall be his duty to establish rules and regulations for the drilling of wells and keeping records thereof, and to require such wells to be drilled in such manner as to prevent injury to the adjoining property, and to prevent gas and water from escaping from the stratum in which they are found into other strata, to establish rules and regulations for shooting wells, and for keeping the gas separate from any water or oil bearing stratum. He shall have authority to require records to be kept, and reports made by gas well drillers, operators, pipe line companies, carbon companies, or any other users of gas, and to establish such rules and regulations as may be necessary to carry into effect the provisions of this Act, and as may be necessary to conserve the gas resources of this State, whether herein specifically granted or not, the only limitation being that such rules and regulations shall not be in conflict with the provisions of this Act.

He shall enforce the provisions of this Act, and of Act 270 of 1918, and of Act No. 91 of 1922.

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Section 8. That any person, partnership, firm, corporation or association of persons wilfully violating any of the provisions of this Act, or any rule, regulation or order of the Commissioner of Conservation prescribed and promulgated by

authority of this Act, which rules, regulations and orders are hereby declared to have the force and effect of statutory law, shall be guilty of a misdemeanor, and on conviction thereof shall be punished for the first offense by a fine of not less than One Hundred ($100.00) Dollars, and not more than One Thousand ($1000.00) Dollars and for the second offense not less than One Hundred ($100.00) Dollars, nor more than Five Thousand ($5000.00) Dollars, and for the third offense not less than One Hundred ($100.00) Dollars, nor more than Ten Thousand ($10,000.00) Dollars, in the discretion of the Court, and each and every day on which any person, partnership, or association of persons shall violate any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, except as provided in Section No. 4 hereof, shall constitute a separate offense hereunder and subject the offender to the penalty herein provided; and three convictions within a period of two years for violating any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, where the violations are willful and where the second violation succeeds a prior conviction, and the third violation succeeds the second conviction, shall subject the offender in the discretion of the court to the forfeiture of the right to do the business in the State that such offender is engaged in or carrying on, and wherein such convictions were had, at the suit of the Commissioner of Conservation before a Court having jurisdiction at the place where such offenses were committed.

Section 9. It shall be the duty of the Attorney General, or the District Attorney of any Judicial District where the businesses described herein are being conducted, to represent the Commissioner of Conservation in the enforcement of all the provisions of this Act, and of the orders, rules, and regulations made, adopted and promulgated by said Commissioner of Conservation by authority of this Act. All criminal prosecutions under this Act shall be by the District Attorney of the Judicial District having jurisdiction of such offenses the same as any other criminal prosecution.

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Section 11. The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other Act of this State, but shall be cumulative and in aid thereof.

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RULES AND REGULATIONS OF THE DEPARTMENT OF CONSERVATION.

Rules, Regulations and Requirements Governing the Conservation of Natural Gas and Crude Oil or Petroleum.

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RULE 2.—*Waste Defined—Protection.* The term "waste" as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste and waste incident to the production of crude oil or petroleum in excess of transportation, storage, or marketing facilities.

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RULE 29 (Revision).—*Permits for Carbon Black Plants.* It shall hereafter be unlawful for any person, firm, corporation, or association to commence the erection in the State of Louisiana of any carbon plant or plants for the manufacture of carbon black from natural gas or to make any extensions or enlargements of such carbon plant or plants hereafter begun, or enlargements of existing plants wherein the erection of such enlargements have not been commenced prior to the promulgation hereof, without having first obtained from the Department of Conservation of the State of Louisiana a special permit, officially signed.

All permit applications as referred to here must be accompanied by a complete and accurate copy of the plants and specifications of the proposed work, stating the amount of gas desired to be used and giving the size of plants, number of houses to each unit of each plant, etc., together with the plant location, name and postoffice address of the company or owner of such plant or plants.

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RULE 43.—*Gas Quota and Gasoline Test on Gas in Monroe Field.* In accordance with the provisions of Act 91 of the Acts of the Legislature of 1922, and under the authority of Section 2 of the said Act, which empowers the Commissioner of Conservation to fix and determine on the 1st day of October, 1922, and semi-annually thereafter, what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black, the following rule is hereby promulgated:

All persons, operators, companies, partnerships, associations, or corporations, whether owners or lessees of a well or wells in the Monroe gas field, and who may be producing therefrom natural gas in connection with the manufacture of carbon black, are hereby prohibited from taking more than twenty (20) per cent of the daily natural flow of any such well or wells within the limits of said field.

All persons, operators, companies, partnerships, associations, or corporations drilling a well or wells in the Monroe gas field shall make a test under the most approved methods for the gasoline contained in the natural gas of such well or wells and report same to the Department of Conservation within thirty days of the time of finishing such well or wells.

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RULE 49.—*Transfers of Carbon Black Permits and Changes in Plants.* Persons, firms, or corporations holding permits to build carbon black plants shall notify the Department of Conservation immediately when it is desired to transfer such permits, to change the name of the person, firm or corporation holding same, or to change the location of any plant. Such notification shall be given in writing and include complete information on such changes.